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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/717,693	11/20/2003	Hai H. Trieu	4002-3430/PC775.01	9321
7590	12/02/2008		EXAMINER	
Woodard, Emhardt, Moriarty, McNett & Henry LLP			RAMANA, ANURADHA	
Bank One Center/Tower				
Suite 3700			ART UNIT	PAPER NUMBER
111 Monument Circle			3775	
Indianapolis, IN 46204-5137				
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			12/02/2008	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/717,693	<b>Applicant(s)</b> TRIEU, HAI H.
	<b>Examiner</b> Anu Ramana	<b>Art Unit</b> 3775

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 10 November 2008.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 37-40,42-49,51,52,55-62,64 and 65 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 37-40,42-49,51,52,55-62,64 and 65 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 11/20/03 is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_

4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date \_\_\_\_\_

5) Notice of Informal Patent Application

6) Other: \_\_\_\_\_

### **DETAILED ACTION**

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on September 9, 2008 has been entered.

#### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

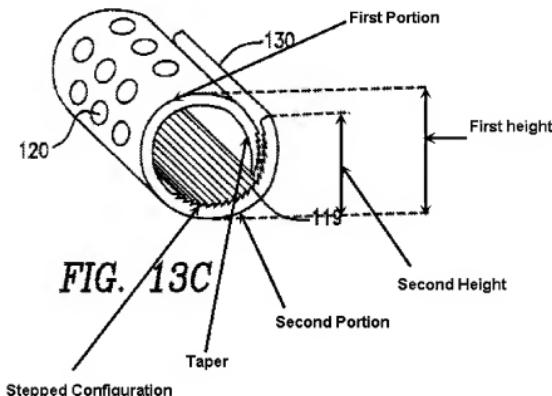
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 37-40, 42-49, 51-52, 55-62, 64 and 65 are rejected under 35 U.S.C. 102(b) as being anticipated by Beyar et al. (US 6,127,597).

Beyar et al. disclose a system for intervertebral disc repair including: a syringe or "delivery instrument"; an expandable element or balloon along a distal portion thereof; a spacer or "expandable device" 125 or 130 removably mounted on the expandable element or balloon; bone growth openings 120 provided in first and second portions of the expandable device; and spikes or "bone engagement members" 153 provided on the first and second portions wherein bone graft or filler is placed in lumen of the expandable device to promote fusion (Figs. 12-13C, col. 29, lines 31-67, col. 30 and col. 31, lines 1-4). It is noted that the first portion could be a portion along the top of the spacer while the second portion could be a portion along the bottom of the spacer.

Beyar et al. clearly disclose that a balloon is inserted through the syringe and inflated to dilate the spacer to the diameter of the intervertebral space (col. 30, lines 28-32).

Regarding claims 44-46, Beyar et al. disclose all elements of Applicant's claimed invention as illustrated in marked up Fig. 13C below.



#### *Response to Arguments*

Applicant's arguments submitted under "REMARKS" in the response filed on November 10, 2008 have been fully considered.

Applicant's amendments overcome the rejections over Sertich et al.

Applicant's arguments with respect to the rejections over Beyar et al. are not persuasive for the following reasons.

Beyar et al. clearly anticipates Applicant's claimed invention since it explicitly or inherently discloses every limitation recited in the claims described in this office action.

Applicant's arguments appear to be directed to the manner in which their invention is utilized. The Examiner notes that the manner or method in which an apparatus is to be utilized is not germane to the issue of patentability of the machine itself (*In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967)).

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anu Ramana whose telephone number is (571) 272-4718. The examiner can normally be reached Monday through Friday between 8:00 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached at (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

AR  
November 24, 2008

/Anu Ramana/  
Primary Examiner, Art Unit 3733